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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1613

HARRY U. SCRUGGS, SR., and
HARRY U. SCRUGGS, JR.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE SIXTH CIRCUIT**

The petitioners, Harry U. Scruggs, Sr., and Harry U. Scruggs, Jr., respectfully ask that a Writ of Certiorari issue to review the judgment and opinion rendered by the United States Court of Appeals for the Sixth Circuit in this proceeding, which said opinion was rendered on February 22, 1977, and the denial of the Petition for Rehearing, with suggestion of rehearing en banc, which was entered on April 18, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals, not yet reported, appears as Appendix "A" hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 22, 1977, and a Petition for Rehearing with Suggestion of a Rehearing En Banc was timely filed and was denied on April 18, 1977; this Petition for Certiorari is invoked under the provisions of 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Since the petitioners received the stolen money from the bank robber in payment on their agreed fee for legal services, without knowledge that the money had been stolen, did the trial court err in denying petitioners' motions for directed verdicts, and in charging the jury that the petitioners would be guilty under Count I if they learned the money had been stolen while it was in defendants' possession?

2. Did the Court of Appeals err in affirming the action of the trial court in denying petitioners' motion for directed verdict as to Count II, the obstruction of justice count, since petitioners had no reason to think the bank robber's other attorneys, to whom petitioners made misrepresentations, would report anything to the FBI?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 United States Code, Section 1510(a):

"Obstruction of Criminal Investigations.—(a) Whoever wilfully endeavors by means of bribery, misrepresentation, intimidation or force or threats thereof to obstruct, delay or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or

Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—

Shall be fined not more than \$5,000.00, or imprisoned not more than five years, or both."

18 United States Code, Section 2113(c):

"(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other

thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association in violation of sub-section (b) of this Section shall be subject to the punishment provided by said sub-section (b) for the taker."

STATEMENT OF THE CASE

The petitioners herein, Harry U. Scruggs, Sr., and Harry U. Scruggs, Jr., were charged in Count I of an indictment returned on March 12, 1974, with knowingly possessing, concealing and disposing of money that had been stolen from a federally insured bank in violation of 18 U.S.C., Sections 2 and 2113(c); and in Count II with wilfully endeavoring to obstruct, delay and prevent the communication of information by each other, and others, to criminal investigators regarding violations of 18 U.S.C., Section 2113 in violation of 18 U.S.C., Sections 1510 and 2.

The Government's proof showed that in January, 1974, James Earl Gardner, then in jail without bond, employed the Scruggs to represent him in connection with several State criminal indictments for an agreed fee of \$20,000.00. The Scruggs then arranged to have Gardner released on a \$1.00 bond. A few weeks later Gardner robbed a federally insured bank. Shortly afterward he paid the Scruggs \$6,000.00, and the next day he paid the Scruggs an additional \$3,000.00 on their agreed fee. A substantial portion of this money had come from the bank robbery.

The Scruggs knew nothing about the bank robbery at the time the money was paid to them. Gardner, testifying for the Government, testified there was no discussion as to

the source of the money. The money was in bills, and some of it was in bank wrappers.

Four days later, on January 15th, the Scruggs learned for the first time that Gardner had robbed a bank on the 11th. Shortly afterward Gardner was arrested by the FBI, and was indicted for the bank robbery.

Kramer, an attorney appointed to represent Gardner, was told by Gardner that he had paid some of the stolen money to the Scruggs. Kramer asked Scruggs, Jr., if Gardner had paid him any money and Scruggs denied it.

Gardner later confessed and told the FBI about the Scruggs payment. Two FBI agents then interviewed the Scruggs and the Scruggs again denied having received any money from Gardner.

Kramer, on February 25, 1974, called on Scruggs, Sr., at his office and Scruggs, Sr., told Kramer that Gardner had not paid them any money. Scruggs, Sr., did not know that Gardner had confessed to the FBI, and there was nothing to indicate to Scruggs, Sr., that Kramer, Gardner's attorney, was going to furnish information to the FBI.

After the court had charged the jury, the jury returned several times and asked the court when the petitioners had to have knowledge the money was stolen. The trial judge finally told the jury that if petitioners learned that the money was stolen at any time while they had possession of the money, they would be guilty, to which petitioners objected. The jury then returned a verdict of guilty.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Involves a Serious Error in Construction of Constitutional Law in Holding That Petitioners' Property Rights Could Be Summarily Taken and Divested Without Due Process in a Criminal Proceeding, Which Is Contrary to the Decisions of This Court.

The Court of Appeals held that petitioners were summarily deprived of all of their property rights in the money here involved, after they had acquired such money for value and without knowledge it was stolen, by the provisions of the bank robbery statute, 18 U.S.C., Section 2113(c), because they had innocently learned, four days after the money had been paid to them on their fee, that it had previously been stolen from a bank. The Court of Appeals stated that petitioners' civil property rights were irrelevant in this criminal case.

But this Court has repeatedly held that a citizen cannot, by a criminal law or proceeding, be deprived of his civil property rights without due process of law. *Powell v. Pennsylvania*, (1888) 127 U.S. 678, 8 S.Ct. 992, 1251, 32 L.Ed. 253; *Nebbia v. New York*, (1934) 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940; *Twining v. New Jersey*, (1908) 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97. See *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, (1930) 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107.

The Government's proof establishes that the Scruggs had no knowledge of the bank robbery, and no knowledge the money was stolen, when the money was paid to the Scruggs in part payment of their fee. It has long been settled that under such circumstances the Scruggs acquired valid legal title to the money, as against the one from whom it had been

stolen. *Rankin v. United States*, (1903) 188 U.S. 557, 565; *In re Brainard Hotel Co.*, (C.A. 2, 1935) 75 F.2d 481, 483; *Kelly Kar Co. v. Maryland Casualty Co.*, (Cal.App., 1956) 298 P.2d 590, 592.

It has also been settled by decision of this Court that a person who receives money is not put upon inquiry by suspicious circumstances. *Holly v. Missionary Society*, (1901) 180 U.S. 284, 293. See *Ohio Casualty Ins. Co. v. Smith*, (C.A. 7, 1962) 297 F.2d 265, 266; *Transamerica Ins. Co. v. Long, Dist. Dir. IRS*, (W.D. Pa., 1970) 318 F.Supp. 156, 160.

Since the Scruggs had valid legal title to this money, the bank robbery statute, 18 U.S.C., Section 2113(c), would bring about unconstitutional spoliation if, as the Court of Appeals held, it automatically divested title out of the Scruggs and vested title back in the former owner simply because the Scruggs fortuitously and blamelessly learned, four days after they had acquired title, that the money had previously been stolen.

Such divesting of title out of one person and vesting title in another party by statute, without opportunity for a judicial hearing as to the property rights involved is a violation of the due process clause and is unconstitutional. *Chicago, B. & Q. R. Co. v. Chicago*, (1897) 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979.

The Scruggs have been denied the opportunity of a judicial determination as to their property rights in this money because both the trial court and the Court of Appeals held that such rights were immaterial in a criminal proceeding.

We submit that such fundamental constitutional error should be corrected by this Court, and the Scruggs should be afforded the opportunity to be heard as to their property rights in this money.

2. The Decision Below on the Obstruction of Justice Statute Is Contrary to the Prior Decision of the Court of Appeals for the Sixth Circuit So As to Call for the Exercise of This Court's Power of Supervision; and Is Also in Conflict With the Decision of Other Courts of Appeals.

In affirming the trial court's action in overruling petitioners' motions for directed verdicts, the Court of Appeals held that the Scruggs violated the Obstruction of Justice Statute, 18 U.S.C., Section 1510, because they misrepresented to the bank robber's other attorneys, Jerry Harris and Bruce Kramer, that they had not received any cash payments from the bank robber, Gardner.

But the Government presented no evidence that the Scruggs had any information that the bank robber's attorneys were going to report anything to the FBI, or any Federal investigator. The Scruggs did not know that Gardner had confessed, and they had no reason to believe that attorneys defending the bank robber were going to report any information to the FBI or any Federal investigator.

This holding by the Court of Appeals below, that the Scruggs were guilty of violating Section 1510 even though they had no knowledge, or reason to believe, that the third parties to whom they made misrepresentations had any intention of furnishing any information to a Federal investigator, is contrary to that Court of Appeals' prior decision in the case of *United States v. Lippman*, (C.A. 6, 1974) 492 F.2d 314, 317. The Court of Appeals there held that the defendant had to have actual knowledge that the third party was going to furnish information to an investigator, to be guilty of a violation of Section 1510. We concede that reasonable cause to believe would be the equivalent

of actual knowledge. *United States v. Kovak*, (C.A. 3, 1971) 438 F.2d 1062, 1066.

The failure by the Court of Appeals to follow its own prior decision in *Lippman* is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The decision by the Court of Appeals below is also contrary to the decision of the Court of Appeals for the Eighth Circuit in the case of *United States v. Williams*, (C.A. 8, 1973) 470 F.2d 1339. This opinion noted that the House Committee on the Judiciary specifically stated that there must be actual knowledge that the intended recipient of the information be a Federal investigator.

Since the proof did not show that the Scruggs had any reason to believe the bank robber's attorneys would furnish any information to Government investigators, this case presents an important question of Federal statutory construction that should be resolved by this Court in the exercise of its supervision over the Federal courts, and to resolve the conflict between circuits.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

Nos. 76-1688-89

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

**HARRY U. SCRUGGS, SR., and HARRY U.
SCRUGGS, JR.,**

Defendants-Appellants.

**Appeal from the United States District Court
for the Western District of Tennessee.**

Decided and Filed February 22, 1977.

**Before: PHILLIPS, Chief Judge, and WEICK and
PECK, Circuit Judges.**

PHILLIPS, Chief Judge. Harry U. Scruggs, Sr., and Harry U. Scruggs, Jr., father and son attorneys practicing together in Memphis, Tennessee, were charged in a three count indictment as follows: (1) Count I charged both defendants with knowingly possessing, concealing and disposing of money that had been stolen from a federally insured bank in violation of 18 U.S.C. §§ 2 and 2113(c);¹ (2) Count II

charged both defendants with wilfully endeavoring to obstruct, delay and prevent the communication of information by each other, and others, to criminal investigators regarding violations of 18 U.S.C. § 2113(c), in violation of 18 U.S.C. §§ 2 and 1510;² (3) Count III charged Scruggs, Jr. with comforting and assisting James Douglas Gardner, in order to hinder and prevent his apprehension, with knowledge that Gardner had committed an offense against the United States in violation of 18 U.S.C. § 3.³

1. 18 U.S.C. § 2113(c) provides:

(e) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

2. 18 U.S.C. § 1510 provides in part:

1510. Obstruction of criminal investigations.—(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or

Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—

Shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

3. 18 U.S.C. § 3 reads in full:

§ 3. Accessory after the fact

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years.

Scruggs, Jr. and Scruggs, Sr. were tried together to a jury on June 9-13, 1975. The jury found Scruggs, Jr. not guilty of the aiding and comforting charged in Count III of the indictment. Both defendants were found guilty on Counts I and II. Scruggs, Sr. was sentenced to pay a fine of \$500 on each count of his conviction. Scruggs, Jr. was sentenced to concurrent terms of one year and one day in the custody of the Attorney General. Both defendants appeal. We affirm.

Three contentions are urged as grounds for reversal of the convictions:

- 1) That there was insufficient evidence to support the verdicts of the jury;
- 2) That the district judge committed reversible error in his instructions to the jury regarding Count I of the indictment—the count charging knowing possession, concealment and disposition of stolen money;
- 3) That 18 U.S.C. § 1510, the statute named in Count II of the indictment, does not provide a proper basis for conviction on the facts presented.

L

On July 27, 1973, James Douglas Gardner was arrested and confined in the County Jail for Shelby County, Tennessee, on several charges of armed robbery and related offenses. Gardner made bond of \$7,500 on that day and was released. He did not appear in the Shelby County Criminal Court at the appointed time to answer to the armed robbery charges. Gardner's bond, therefore, was revoked and a further indictment issued for bond jumping. On November 19, 1973, Gardner was arrested and returned to the Shelby County

Jail (a total of ten indictments were then pending against him) where he remained until January 1974.

On January 27, 1974, the appellants, Harry U. Scruggs, Jr. and Harry U. Scruggs, Sr., Memphis attorneys, contacted Gardner in the Shelby County Jail to make arrangements to represent him on the state charges he faced. The Scruggses testified that they made this contact at the insistence of Gardner's mother who was a hostess at a restaurant they frequented. Gardner told the Scruggses that he wanted them to represent him on all of the state indictments. The Scruggses agreed but set a fee for their services of \$10,000 payable in advance. Gardner indicated that he could pay the fee, that he had a helpful relative in Arkansas and a bank account in Florida, but that he could not get the money while he remained in jail. At this time (January, 1974), Scruggs, Jr. was engaged almost full time as an attorney for the Shelby County Public Defenders Office. Scruggs, Jr., on Gardner's behalf, contacted the Director of the Shelby County Pretrial Release Program and, on January 31, 1974, Gardner's original \$7,500 bond was reinstated and Gardner was released from jail upon posting a \$1.00 additional bond for the bail jumping charge.

Twelve days later, at approximately 2:30 p.m. on February 11, 1974, Gardner and an accomplice robbed the Fox Meadows Branch of the Memphis Bank and Trust Company of some \$21,000 in cash.

Later in the afternoon of February 11th, Gardner called the Scruggses at their law office and informed them that he had some money for them. He was told to come in during the early evening and he arrived at their office around 5:30 p.m. carrying a brown briefcase. Gardner was ushered into the Scruggses' law library where, in the presence of

both attorneys, he counted out \$5,000⁴ in cash from the briefcase. As the Scruggses recalled this meeting at trial, with the exception of a single one hundred dollar bill, the entire \$5,000 was in small denominations (ones, fives and tens) the money was dirty and wrinkled, and there were many rubber bands in the briefcase.⁵ Scruggs, Sr. said that he asked Gardner whether "he was mixed up in anything," and Gardner assured him that he was not and that the money was "clean money." At trial Gardner told the court that the money he delivered to the Scruggses on February 11, 1974, was part of the proceeds of the bank robbery earlier that day, but he did not tell the Scruggses this on the 11th of February.

After counting the money, Scruggs, Jr. wrote Gardner a receipt from one of the standard receipt books maintained by the Scruggses in their law practice. Scruggs, Jr. told the jury that he and his father were in a hurry that evening and out of carelessness he made out the receipt to Gardner for \$6,000 rather than for the \$5,000 amount they actually received. Gardner left the Scruggses' office with the \$6,000 receipt and Scruggs, Jr. testified that he put the cash into a brown file folder and locked it in his desk drawer.

Gardner returned to the Scruggses' office the next day, February 12, 1974. Scruggs, Sr. met with Gardner alone

4. This \$5,000 figure is the amount the appellants testified to receiving on February 11. Gardner testified that he in fact gave them \$6,000 on this first occasion. Although it is appropriate on appeal for this court to review all the evidence and inferences therefrom in the light most favorable to the government (*United States v. Wolfenberger*, 426 F.2d 992, 995 (6th Cir. 1970)), here, and where indicated elsewhere in this opinion, we present the facts as they were related at trial by the appellants. We do this to demonstrate the substantial extent to which the elements of the crimes charged were established at trial by the appellants' own testimony.

5. Gardner testified that the money was in bundles each bound with a "Memphis Bank & Trust Company" wrapper.

on this occasion and Gardner gave him a bundle of ten one hundred dollar bills in further payment of the \$10,000 fee. Scruggs, Sr. gave Gardner a second receipt.*

On Friday morning, February 15, 1974, Scruggs, Sr. appeared in Shelby County Criminal Court with Gardner to get a continuance of the pending matters.* Around noon on the 15th, Gardner met with Scruggs, Jr. and an employee of the Scruggses, a Mr. Peters, at the Scruggses' office. According to Scruggs, Jr., Gardner complained about having trouble with his mother and about wanting to move out of his mother's home into an apartment. As a favor to Gardner, Scruggs, Jr. gave Gardner a note with the address of Mr. Peters' apartment on it and told Gardner that he could go there and stay.* As Gardner was leaving the Scruggses' office, Scruggs, Sr. approached and asked him to return the receipts they had given him on February 11th and 12th. Scruggs, Sr. testified that he asked for the receipts back because he and his son had recounted the money and found that they had not received from Gardner the amounts indicated on the receipts. Gardner gave Scruggs, Sr. the two receipts.

6. Gardner claimed that he gave Scruggs, Sr. \$3,000 on February 12 and that \$1,000 was in new, consecutively numbered one hundred dollar bills.

7. In the Shelby County Criminal Courts, continuances are routinely granted at the request of retained attorneys because they are not required to "sign the jackets" for a defendant's case until their fee has been paid.

8. According to Gardner, the Scruggses confronted him at this meeting on February 15 and he confessed to them to having committed the bank robbery on February 11. Gardner claimed at trial that Scruggs, Jr., gave him Mr. Peters' address so that he could hide from the police for a few days and come up with the rest of the \$10,000 fee. The jury acquitted Scruggs, Jr. of the charges that he had aided and comforted Gardner in an effort to hinder and prevent his apprehension.

Scruggs, Jr. testified that later in the afternoon of February 15, 1974, around 4:20 p.m., he received a telephone call at his office with some information concerning Gardner. Based on this information, Scruggs, Jr. and Mr. Peters set about trying to locate Gardner. Scruggs, Jr. testified that he went to the Memphis City jail but found no record that Gardner had been there. He called a friend of his on the robbery squad of the Memphis Police Department and asked if a James Gardner had been involved in any robbery. Finding nothing, he called the Shelby County Jail but, again, no one knew where Gardner was.

Scruggs, Jr. was not able to find Gardner because he was in the custody of the Memphis Office of the Federal Bureau of Investigation. Around four in the afternoon of February 15th, a federal grand jury had returned an indictment against Gardner charging him with the February 11, 1974, robbery of the Fox Meadows Branch of the Memphis Bank & Trust Company. The FBI immediately arrested Gardner at his home and took him to the FBI office for processing.

According to Scruggs, Jr., he received a telephone call at his office around 5:40 p.m. on the 15th. The caller identified himself only as "the F.B.I." and told Scruggs, Jr. that Mr. James Gardner wanted to talk to him. Gardner came onto the line and told Scruggs, Jr. that he had been arrested. Scruggs, Jr. testified that he advised Gardner not to talk to the F.B.I., but that he was unable to find out why Gardner had been arrested because no one (neither Gardner himself nor the F.B.I. agents) told him any more than that there was an "investigation" underway. Agent Hart of the Memphis Office of the F.B.I. testified that he spoke with Scruggs, Jr. after Gardner and, in response to Scruggs, Jr.'s questioning, told Scruggs that Gardner had been charged with bank robbery.

On Saturday morning, February 16, 1974, Scruggs, Jr. and Scruggs, Sr. met at their office before going to visit Gardner in the Shelby County Jail. Scruggs, Jr. stated at trial that Scruggs, Sr. had the morning *Memphis Commercial Appeal* with him and that the paper was "spread all over" with accounts of James Gardner's arrest for the robbery of the Memphis Bank & Trust Company on February 11th. The articles detailed the robbery itself and Gardner's subsequent apprehension. The Scruggses have maintained throughout their trial and this appeal that the *Commercial Appeal* articles on the morning of February 16, 1974, were the first information they received indicating Gardner was involved in or accused of a bank robbery.

After reading the paper, the Scruggses went to see Gardner in jail. According to Scruggs, Sr., they confronted Gardner with the newspaper accounts and questioned him about the bank robbery. Gardner told them that the FBI "had the wrong man."

On Tuesday, February 19, 1974, Gardner had an initial hearing on the bank robbery charge before the federal Magistrate. Scruggs, Sr. appeared with Gardner but only to tell the court that he would not be representing Gardner on the federal charge. The Magistrate appointed a local attorney, Bruce Kramer, to represent Gardner.

Bruce Kramer met at length with his new client on February 19 and 20, 1974. Gardner admitted his role in the bank robbery to Kramer and described in detail what took place. When Kramer pressed Gardner about what had become of the proceeds of the robbery, Gardner told Kramer the story of the payments to the Scruggses on February 11th and 12th.

Gardner's account of the payments to the Scruggses deeply disturbed Kramer. Unsure whether to believe Gardner and uncertain about what to do with the information he had concerning the proceeds of the bank robbery, Kramer consulted a senior member of the law firm with whom he was associated. Based on that discussion, Kramer determined to contact the Scruggses directly.

On February 21, 1974, Kramer spoke with Scruggs, Jr. by telephone. Kramer testified at trial that he told Scruggs, Jr. what Gardner had said about two cash payments to the Scruggses totalling \$9,000.⁹ According to Kramer, Scruggs, Jr. responded that he had not received any money from Gardner and that "there was nothing to" the story Gardner had told. As Scruggs, Jr. recalled this telephone conversation at trial: ". . . Mr. Kramer did ask if I had received \$7,000, and I told him that I had not received \$7,000 . . . I had not. I had received only \$6,000."

Kramer met again with Gardner and told him that Scruggs, Jr. had denied receiving any money from him. Gardner insisted he was telling the truth and indicated that Jerry Harris, an attorney who had represented Gardner on state charges before the Scruggses took over, could verify the account. Kramer stated at trial that he consulted with Jerry Harris, that Harris was familiar with the story of the payment of bank robbery proceeds by Gardner to the Scruggses, and that after this conversation with Harris, Kramer decided to report the information he had to the F.B.I. Scruggs, Jr. testified that at some point Jerry Harris also confronted him with Gardner's story: ". . . Mr. Harris said this Gard-

9. Gardner told Kramer on February 19, 1974, the same story Gardner maintained at trial—that he gave the Scruggses \$6,000 on February 11th and \$3,000 on February 12th, for a total of \$9,000.

ner says that he has paid you \$9,000 and I told him [Harris] that was not correct."

On February 22, 1974, the Scruggses met with Gardner and Gardner's mother at the Shelby County Jail. Scruggs, Jr. explained at trial that Gardner repeated his desire to have the Scruggses represent him on the state charges at this meeting. Scruggs, Jr. told the Gardners that he would have to have some assurance that the \$10,000 fee would be paid in full. He produced a promissory note for \$10,000. Mrs. Gardner signed the note. This note was introduced as an exhibit at the Scruggses' trial. It contains no reference to the cash payments made by Gardner to the Scruggses on February 11th and 12th.

Also on February 22nd, Kramer went to the F.B.I. with the information he had regarding the proceeds of the robbery. Soon after their visit with the Gardners, the Scruggses were met at their office by two F.B.I. agents. The Scruggses agreed to be interviewed by the agents, but insisted on making a tape recording of the session.¹⁰

The agents testified that both Scruggses denied having any knowledge that Gardner was involved in a bank robbery until reading about it in the *Commercial Appeal* on February 16th. When the agents indicated to the Scruggses that the F.B.I. had information that Gardner had made large cash payments to them just after the robbery on February 11th and again on February 12th, both Scruggses emphatically denied receiving cash from Gardner and they explained to the agents that, just that very morning, the Gardners had

10. The Scruggses were not able to produce the tape recording of this interview with the F.B.I. at trial. Scruggs, Jr. explained that the batteries on the tape recorder must have been weak because he found nothing on the tape after the agents left.

secured the payment of their fee by signing a promissory note.

The agents then asked to see the Scruggses' receipt books. Scruggs, Jr. produced a book for the agents containing the carbon copies of all the fee receipts written during the course of his practice for part of 1973 and all of 1974. The agent who inspected the receipt book noticed that there were regular payments recorded up to February 11, 1974. The agent testified that the last receipt on one page was dated February 11, 1974, and the first receipt on the next page was dated February 16, 1974. There were no receipts in the book dated between those two days. Scruggs, Jr. explained the lapse in the book by saying that he did not receive any money between the 11th and 16th of February, 1974. On closer inspection, the agent observed that two pages of copies of receipts had been torn out of the receipt book in the gap between the 11th and 16th of February, leaving only the ends of the pages where they had been bound into the book. This was called to the Scruggses' attention. Scruggs, Jr. stated at the time that he did not know what had happened to the missing pages but he suggested that an employee might have mistakenly torn them out. At trial Scruggs, Jr. explained that his wife was taking telephone calls at the office on the evening of February 11th and had used some pages of duplicate fee receipts out of the book to take down telephone messages. Neither the pages of duplicate receipts nor the original receipts given to Gardner and then taken back by Scruggs, Sr. were produced at trial.

Scruggs, Jr. testified that on Saturday, February 23, 1974, he took his share of the cash received from Gardner — \$3,000 or one-half of the \$6,000 the Scruggses say Gardner actually gave them—to his home in a brown manilla folder.

After a sleepless night of "wondering what was going on," he called his father who lived next door and asked his father to give him the other half of the cash. The Scruggses met in the yard between their houses and Scruggs, Jr. took Scruggs, Sr.'s half of the cash. Scruggs, Jr. explained that he returned to his house and did as follows: ". . . I took the money and it was chilly that day . . . and I threw the money into the fireplace and burned it up every bit of it." When asked at trial why he burned the money, Scruggs, Jr. replied: "I burned it because I did not know where that money came from because Mr. Gardner had told me so many tales that I didn't know really where that money came from."

On Monday, February 25, 1974, Bruce Kramer, Gardner's attorney for the bank robbery charge, met with Scruggs, Sr. at the Scruggses' office. As he had done over the telephone with Scruggs, Jr. on February 21st, Kramer confronted Scruggs, Sr. with Gardner's allegations that the Scruggses had received the cash proceeds of the February 11th bank robbery. Kramer testified that Scruggs, Sr. denied that he had ever received any money from Gardner and insisted that nothing Gardner said could be believed.¹¹

Subsequently, the Scruggses requested a meeting with the United States Attorney and on February 28, 1974, both appeared with counsel and gave voluntary statements. The Scruggses admitted that James Gardner had made large cash payments to them in their office on or about the 11th and 12th of February. They admitted giving Gardner receipts

11. Kramer also testified that Scruggs, Sr. insisted on playing a tape recording, for him at this meeting. The tape contained an earlier conversation between the Scruggses and Gardner relating to attorney-client matters having no apparent bearing on Kramer's responsibility to defend Gardner on the bank robbery charge. Scruggs, Sr. indicated that he wanted Kramer to hear the tape so Kramer would see that Gardner was crazy and could not be believed.

for the payments and Scruggs, Sr. told of getting them back from Gardner because they were in error. Scruggs, Jr. admitted that he had denied receiving the payments when he was questioned by Bruce Kramer and Jerry Harris, but he denied that he had torn any pages out of his receipt book. Scruggs, Jr. stated that he no longer had the money he and his father had received from Gardner, because he had burned it in his fireplace at home on February 24th.

The Scruggses were indicted as hereinabove stated on March 12, 1974.

It is readily apparent from this review of the evidence that all of the elements of an offense under 18 U.S.C. § 2113 (c) were proved by the government beyond a reasonable doubt. The essential elements of a § 2113(c) offense are these: 1) proof that property *or money* or other things of value were taken from a federally insured bank; 2) proof that the defendants possessed, concealed or disposed of said property or money; and 3) proof that the defendants had knowledge of the stolen character of the property or money at the time they possessed, concealed or disposed of it. The Scruggses do not appear to challenge the sufficiency of the evidence as to elements 1 and 2 above. They strenuously contend, however, that the government failed to establish the requisite "knowledge" in element 3.

Proof of knowledge, like proof of intent, is rarely established by direct evidence. It has long been recognized in this circuit and elsewhere that circumstantial evidence—*independent facts from which an inference of the ultimate fact to be established may rationally be drawn in light of common experience*—can be sufficient to support a jury's determination that a defendant had guilty knowledge beyond a reasonable doubt. *See, e.g., Melson v. United States*, 207 F.2d 558,

559 (4th Cir. 1953); *United States v. Werner*, 160 F.2d 438, 441-42 (2d Cir. 1947); *Kasle v. United States*, 233 F. 878, 886-88 (6th Cir. 1916); *United States v. Zochowski*, 331 F.Supp. 1070, 1072 (S.D.N.Y. 1971), *aff'd*, 456 F.2d 1336 (2d Cir. 1972); *In Re Ryder*, 263 F.Supp. 360, 364-65 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967).

Citing this court's opinion in *Kasle, supra*, 233 F. 878, with approval, Judge Learned Hand had this to say about knowledge of the stolen character of goods in *United States v. Werner, supra*, 160 F.2d at 441-42:

The defendants ask us to distinguish between "knowing" that goods are stolen and merely being put upon an inquiry which would have led to discovery; but they have misconceived the distinction which the decisions have made. The receivers of stolen goods almost never "know" that they have been stolen, in the sense that they could testify to it in a court room. . . . But that the jury must find that the receiver did more than infer the theft from the circumstances has never been demanded, so far as we know; and to demand more would emasculate the statute,

Taking the Scruggses' own story at face value, these defendants had the following information when they finally "disposed of" the cash by burning it on February 24, 1974. They knew that their client, James Gardner, had been arrested and charged with the February 11th robbery of the Fox Meadows Branch of the Memphis Bank and Trust Company. They had seen pictures in the newspaper taken by bank cameras of a person that looked like their client caught in the act of robbing a bank. They knew that less than three hours after their client allegedly robbed a bank, he had appeared at their law office with a briefcase full of cash in small denominations. They knew that their client

had told the F.B.I. and two different attorneys, Jerry Harris and Bruce Kramer, that he had paid the Scruggses a large amount of cash out of the proceeds of the alleged bank robbery. The Scruggses knew that they were under suspicion by the F.B.I. in connection with Gardner, the fee payments and the bank robbery proceeds as a result of the interviews and investigation conducted at their offices by the F.B.I. on February 22, 1974.

Can it be said that with all of this information the Scruggses were at no point "put upon an inquiry" in regards to the source of the money they received from Gardner on February 11th and 12th? *Werner, supra*, 160 F.2d at 441. We do not think so. Even if the jury had discounted Gardner's insistence throughout the trial that the Scruggses knew as early as February 15th that they had been paid with the proceeds from a bank robbery, the evidence is overwhelming that the Scruggses had the requisite knowledge of the character of the money they had received during the period they possessed, concealed, and finally, disposed of it.

The Scruggses' contentions concerning the sufficiency of the evidence supporting the convictions on Count II of the indictment (wilful obstruction of communications to investigators) are dealt with in Part III below.

II.

Related to their challenge to the sufficiency of the evidence of guilty knowledge, the Scruggses also challenge the charge to the jury by the District Court on the meaning of "knowing" for purposes of 18 U.S.C. § 2113(c).

At the close of all proof, District Judge Robert M. McRae, Jr. reviewed his intended charge to the jury with counsel

and there were no stated objections. The charge was given and the jury retired to deliberate. After some deliberations, the jury returned to the courtroom and the foreman asked for further instructions on the meaning of the word "knowingly" in the indictment. The court re-read part of the original charge, then gave the following new instructions:

I further submit to you that there is no dispute on the fact that Mr. Scruggs, Jr. disposed of at least six thousand dollars by burning it.

Therefore, the issue for you to determine is that if during the time that the money was possessed between the dates in the indictment, and I submit that they knew they possessed, they knowingly possessed it, then you must decide whether, in fact, they knew it was money that was stolen.

If the knowledge came at any time during the possession then they could be found guilty. It does not mean they had to know it was stolen at the time they got it.

Now, at the time it was concealed if you find it was concealed they must have known that it was stolen from the bank.

At the time it was burned up you must decide whether Mr. Scruggs, Jr. knew that, regardless of whether he knew it when he received it. That is the fact that you must determine.

Now, in this process of course you are the ones who are to determine what weight to give to all the evidence.

Now, maybe this is some help to you, and possibly it answers your questions. Do you think it does?

THE FOREMAN: Yes, sir, that's exactly it.

The Scruggses contend on this appeal that they did not know the money they received from Gardner was stolen from a bank at the time they received it. They reason that Gardner gave them the money as consideration for their agreement to represent him in the state courts, and, as a result of their innocence of the source of the funds, they acquired "title" to the money when it was given to them. It follows therefore, according to the Scruggses, that the instruction on "knowingly" was in error because it allowed the jury to convict the defendants if the jury found the defendants learned the money was stolen while they possessed it, without having to find that the defendants knew the money was stolen at the time they received it and "acquired title" to it. In support of this argument the Scruggses have cited a large number of state and federal decisions in the commercial and banking contexts holding that innocent parties can acquire "title" to misappropriated funds sufficient to defeat efforts at recovery of the funds by the original victim of the theft.

Whatever the rules regarding "title" may be in the fields of commerce and banking, the appellants would have this court ignore entirely the criminal statutes under which they were charged. 18 U.S.C. § 2113(c) is worded clearly in two ways pertinent to the Scruggses' argument. The statute specifically names "money" as a thing of value covered by the statute which is unlawfully possessed, concealed, etc., if there is knowledge of its stolen character. Additionally, the statute is worded in the disjunctive. It is a federal offense to receive *or* dispose *or* conceal money stolen from a federally insured bank with knowledge, etc. The Tenth Circuit's interpretation of similar language in 18 U.S.C. § 659 is analogous:

We are of the opinion that the offense of possession of stolen goods is distinct from the offense of receiving stolen goods. The statute defines these offenses in the disjunctive and, therefore, clearly reflects the congressional intent that there were to be distinct crimes. This construction is reasonable because in instances similar to the case at bar the long continued possession of goods may well allow circumstances to give rise to knowledge that the property had been stolen even though the original receipt of the goods may have been innocent.

United States v. Koran, 453 F.2d 144, 146 (10th Cir. 1972).

Appellants were not indicted for receiving stolen money. They were charged with possession, concealment and disposition. Their own testimony at trial established that they did some or all of these things with the money they received on February 11 and 12. District Judge McRae correctly instructed the jury that a violation of § 2113(c) was established if at any time during their possession of the money the Scruggses came into knowledge of its stolen character. This is what the statute makes unlawful and this court declines to read the rules of commerce relied upon by appellants into the plain language of these criminal provisions.

III.

In addition to challenging the sufficiency of the evidence supporting the convictions under 18 U.S.C. § 1510 (Count II of the indictment), the appellants challenged the propriety of prosecution under this section based on the Fifth Circuit's holding in *United States v. Cameron*, 460 F.2d 1394 (5th Cir. 1972).

18 U.S.C. § 1510, reproduced in part in note 2 above, was enacted by Congress in 1967 for the following stated purposes:

PURPOSE OF THE BILL

The purpose of the proposed legislation is to amend chapter 73, title 18, United States Code (relating to obstruction of the administration of justice), by adding a new section prohibiting the obstruction of Federal criminal investigations.

Sections 1503 and 1505 of chapter 73, title 18, presently prohibit attempts to influence, intimidate, impede, or injure a witness or juror in a judicial proceeding, a proceeding before a Federal agency, or an inquiry or investigation by either House of the Congress or a congressional committee. However, attempts to obstruct a criminal investigation or inquiry before a proceeding has been initiated are not within the proscription of those sections. The proposed legislation would remedy that deficiency by providing penalties for attempting to obstruct the communication to a Federal penal law, thus extending to informants and potential witnesses the protections now afforded witnesses and jurors in judicial, administrative, and congressional proceedings.

H.R. Rep. No. 658, 90th Cong., 1st Sess. (1967), 1967 U.S. Code Cong. & Ad. News 1760.

In *Cameron*, the Fifth Circuit held that § 1510 was inapplicable because, on the facts of that case, there was no witness, juror or person who, in the words of the court, "has information as to the offense which some third party endeavors to prevent communication of to" a criminal investigator. *Cameron, supra*, 460 F.2d at 1401. In *Cameron*

this was true because the indictment charged that the victim of the alleged threats and misrepresentations was an accomplice to the efforts of the defendant to obstruct the criminal investigation therein. The court analyzed the problem this way:

... Section 1510 . . . as written deals with the activities of at least three separate individuals or classes of individuals.

For clarity of exposition, we enumerate them in a different order from that followed in the statute. The three are:

- A, a criminal investigator (i.e. the F.B.I. special agent here) who is conducting an investigation of the violation of a criminal statute of the United States (as here, Title 18, U.S.C., Sec. 2113, the bank robbery statute);
- B, the person who has information as to the offense which some third party endeavors to prevent communication of to A, and
- C, the party denounced by the statute who willfully endeavors by means of bribery, misrepresentation (the only means charged in this case), intimidation, or force or threat thereof to obstruct, delay, or prevent communication of the information by B to A. The appellant of course falls under C.

In the present indictment, Wright is charged to have been the accomplice of Cameron, and therefore must fall under C, above, along with Cameron. But there is no one involved who can be B (in our diagram, *supra*) except Wright, the claimed recipient of Cameron's

admonition to say nothing about the money. In a word, the prosecution charged (and is here on appeal defending) the somewhat startling proposition that Wright and Cameron imposed silence on Wright by misrepresentation. Under neither logic nor law could Wright have been his own victim. Put another way, if the United States desired to prosecute Cameron under Section 1510 for directing or advising Wright to say nothing about the currency, it should have left Wright out as an accomplice in that enterprise . . . (footnotes omitted)

Cameron, supra, 460 F.2d at 1401-02.

Count II of the indictment in the instant case charges the Scruggses with wilfully endeavoring to prevent communication of information to criminal investigators "by each other, and others." (Emphasis added.) As the Eighth Circuit found on the facts presented in *United States v. Pecina*, 501 F.2d 536 (8th Cir.), *cert. denied*, 419 U.S. 1072 (1974), we find that Cameron is of no aid to the appellants in this case because we clearly do have persons to fill the role of "B" in the Fifth Circuit's analysis, quoted above. 460 F.2d at 1401. As demonstrated in the foregoing recitation of the facts, the Scruggses repeatedly misrepresented to Gardner's attorneys, Jerry Harris and Bruce Kramer, that they had not received any cash payments from Gardner. The Scruggses admitted making these misrepresentations in their voluntary statements to the F.B.I. on February 28, 1974. These misrepresentations were made at a time when the F.B.I. was suspicious of the Scruggses and had them under investigation as a result of information from Kramer.¹²

12. It is reemphasized that on February 25, 1974, three days after the extensive interrogation by the F.B.I. of the Scruggses concerning the money from Gardner, Scruggs, Sr. was confronted by Bruce Kramer and denied receiving any money from Gardner.

The misrepresentations were made before the initiation of judicial proceedings against the Scruggses and thus the facts present a storybook case of the wrongs § 1510 was enacted to combat. The evidence clearly was sufficient to support the jury's verdict that the appellants made misrepresentations in an endeavor to obstruct the efforts of criminal investigators to uncover their own wrongdoing.

The judgments of conviction are in all respects affirmed.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Numbers: 76-1688
76-1689

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

HARRY U. SCRUGGS, SR., and
HARRY U. SCRUGGS, JR.,
Defendants-Appellants.

On Appeal From the United States District Court
Western District of Tennessee
Western Division

**PETITION FOR REHEARING WITH SUGGESTION
OF A HEARING IN BANC**

Come now defendants-appellants, Harry U. Scruggs, Sr., and Harry U. Scruggs, Jr., and petition this Honorable Court, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure for a rehearing on the grounds that the Court has overlooked or misapprehended the law applicable to the facts of this case as follows:

I. *The Court has overlooked the fact that appellants have been deprived of their property rights in the money involved without due process of law.*

This Court, in a very thorough and carefully considered opinion, has stated that appellants' argument that they had title to the money here involved, if accepted by the Court, would have the Court "ignore entirely" the criminal statutes under which appellants were charged. We submit that in reaching this conclusion the Court has overlooked the fact that appellants, as owners of the money here involved, cannot be divested of their property rights in such money without due process with respect to such property rights. Yet that is just what this Court's opinion does. It completely strips appellants of all of their property rights in this money without any opportunity for a hearing or judicial determination as to their property rights. This, we respectfully submit, is a clearly contrary to the Due Process clause of the Federal Constitution.

The appellants are not asking the Court to ignore entirely Section 2113(c). We are simply presenting to the Court the fact that this statute cannot be applied to the legal owner of money without depriving such owner of his property rights in the money without due process of law, in violation of the Fifth Amendment.

We merely ask the Court to construe this statute so as to avoid denial of due process to the appellants. Every statute has to be construed, and a request for judicial construction and definition does not mean that complete emasculation of the statute is sought.

As we pointed out in appellants' Reply Brief, page 7, a literal reading of the statute would make a policeman

who took stolen money from a bank robber guilty of a felony, because he possessed money that he knew had been stolen from a bank. But the statute must be construed. And the statute must be construed so as not to make it unconstitutional if at all possible. Here the statute can be, and we submit must be, construed so as not to apply to one who is the legal owner of money that has previously, unbeknownst to such owner, been stolen from a bank. This does not ignore Section 2113. It simply refuses to apply it in a manner that would be unconstitutional. As against anyone other than a policeman, and one who has acquired legal title to the money, the statute would still apply with full force.

We respectfully submit that the Court's opinion did overlook the fact that the Scruggs, by the action of the lower court, and the decision of this Court, have been deprived of their property rights in this money without due process of law, and that for this reason appellants should be granted a rehearing.

If Section 2113(c) only prohibited *concealment* or *disposal* of property stolen from a bank, it could conceivably be argued that Congress intended this Section to apply to one who has acquired legal title to money previously stolen from a bank, because such owner could then still keep the money. Or if this Section merely prohibited possession of such money by the legal owner, until the government had no further need of the money in its investigation or prosecution of the robber, then it could be argued that this Section was intended to apply to one who had, since the theft, become the legal owner of the money, because he would not be permanently deprived of his property rights.

But Section 2113(c) makes it a felony for a person to possess money that he knows has been stolen from a bank, at any time. Thus if a person who has acquired legal title to money thereafter learns that the money had been stolen from a bank before it was negotiated to him, he cannot possess that money at any time thereafter—even after the government has no further need for such money in its investigation or prosecution of the robber. He is completely and summarily divested of his property rights in that money without any opportunity for a hearing or judicial determination of his property rights. This clearly is an unconstitutional confiscation, or forfeiture, of property rights without due process, and is in violation of the Fifth Amendment.

It is well settled that a person cannot be deprived of his property rights without due process of law, even in a criminal proceeding. In

Powell v. Pennsylvania, (1888) 127 U.S. 678, 32 L.Ed. 253, 8 Sup. Ct. 992, 1257

defendants appealed from their conviction of a criminal offense, claiming that a State statute prohibiting the sale of oleomargarine deprived them of liberty and property in violation of the Fourteenth Amendment. The Supreme Court said:

“. . . The judiciary department is bound not to give effect to statutory enactments that are plainly forbidden by the Constitution . . . if the incompatability of the Constitution and the [criminal] statute is clear or palpable, the courts must give effect to the former.” (Parenthetical matter added.)

In

Nebbia v. New York, (1934) 291 U.S. 502, 78 L.Ed. 940, 54 Sup. Ct. 505

defendant appealed from a criminal conviction for violating orders of the New York Milk Control Board, on the ground that the statute violated the due process clause of the Fourteenth Amendment. The Supreme Court considered the due process claim at length, and, while it found no denial of due process, it is clear from its opinion that the constitutional prohibition against depriving one of his property without due process does apply to a criminal proceeding.

In this case, appellants claim, and the record shows, that appellants were paid the money here involved by their client in payment of their agreed fee for legal services, some of which services they had already rendered. (Tr. 365.) The record shows that appellants had no knowledge the money was stolen when they received it. (Appellants' Brief, pp. 9-11.) Under the authorities cited in appellants' brief, pp. 11-21, the appellants then acquired valid, legal title to this money, because, unlike almost all other personal property, title to stolen money is acquired by a purchaser for value, who is without actual knowledge that it was stolen when he receives the money. Appellants' Brief, p. 12.

Yet the trial court instructed the jury that it was immaterial that appellants did not know the money was stolen when they received it, (Tr. 571, 572) and this Court has affirmed the judgment of the trial court without any consideration of whether appellants did acquire legal title to this money when it was paid to appellants.

We respectfully submit that this Court is clearly in error in holding that it is immaterial whether appellants had legal title to this money.

The record shows that appellants owned this money for at least four days before they learned that the money was stolen. Appellants' Brief, page 10.

It is fundamental that the owner of property cannot be deprived of his property without due process of law.

The construction placed by this Court on Section 2113 (c) means that the owner of money, who at any time after he acquired the title to the money simply learns, without any other action on his part, that it had been stolen before he acquired the money, is automatically, without any opportunity for a hearing or a day in court, divested of his title to such money, and his title is automatically transferred and vested back in the person from whom the money had previously been stolen.

But such divesting of title out of one person and vesting title in another party by statute, without any opportunity for a judicial hearing is clearly unconstitutional under the due process clause. In

Chicago, B. & Q. R. Co. v. Chicago, (1897) 166 U.S. 226, 41 L.Ed. 979, 17 Sup. Ct. 581

the Supreme Court specifically stated that title to property could not be so divested by statute, without opportunity for a judicial hearing on the question of defendant's property rights:

"In *Davidson v. New Orleans*, 96 U.S. 97, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the Fourteenth Amendment. See also *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403, 417. Such an enactment would not receive judicial sanction in any country having a written constitution distributing

the powers of government among three coordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated not as an exertion of legislative power, but as a sentence—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions."

This Court's opinion in this case holds that the owner of money is divested of his title, and title to such money is vested in a third party—the bank from which the money had previously, unbeknownst to the present owner, been stolen, by the fortuitous and innocent act of the present owner in learning that such money had previously been stolen. Clearly this is spoliation, declared unconstitutional by the Supreme Court in the above cited *Chicago, B. & Q. R. Co.* case.

Such automatic divestiture of title, which is approved by the Court's decision in this case, is clearly a denial of due process because it deprives the owner of money of his property rights in such money without any opportunity for a judicial determination of his property rights. As stated in

Twining v. New Jersey, (1908) 211 U.S. 78, 53 L.Ed. 97, 29 Sup. Ct. 14

"Due process requires . . . that there shall be notice and opportunity for hearing given the parties . . ."

In

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, (1930) 281 U.S. 673, 74 L.Ed. 1107, 50 Sup. Ct. 451

the Supreme Court emphasized the right of a party to be heard as to its substantive property rights:

"We are of the opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right . . . It is plain that the practical effect of the judgment of the Missouri Court is to deprive the plaintiff of property without an opportunity to be heard in its defense."

The Court's opinion in this case did not even consider whether Section 2113(c), as construed by this Court, deprived appellants of their property rights in this money in violation of the due process clause of the Fifth Amendment. We submit that this was overlooked by the Court in its opinion filed herein.

We would therefore most earnestly urge this Court to grant appellants a rehearing, so as to afford appellants a fair and reasonable opportunity to be heard as to their property rights in the money here involved; and that upon such rehearing, the Court determine whether 18 U.S.C., Section 2113(c), can constitutionally be applied to one who has acquired money for value and without knowledge that it was stolen; and that the Court reverse the judgment of conviction under Count I and dismiss Count I against both defendants.

II. The Court's opinion that appellants violated Section 1510 is contrary to this Court's prior decision in the Lippman case.

We respectfully submit that the Court's opinion in this case overlooks the prior holding of this Court in the case of

United States v. Lippman, (C.A. 6, 1974) 492 F.2d 314, 317

In that case this Court held that in a prosecution for violation of Section 1510:

"It is required that the defendant have actual knowledge that the intended recipient of the information be a federal criminal investigator."

The Court, in its opinion in this case, states that the Scruggs violated Section 1510 because they "repeatedly misrepresented to Gardner's attorneys, Jerry Harris and Bruce Kramer, that they had not received any cash payments from Gardner." Opinion, p. 18.

But there is not one shred of proof in this record that either of the Scruggs had any idea that Harris or Kramer intended to convey what the Scruggs told them about the money to the FBI. Thus Kramer first talked to Scruggs, Jr., by telephone, and Scruggs, Jr., denied having received any money from Gardner. (Tr. 164.) Nothing in this conversation indicates that Kramer, Gardner's attorney, was going to convey any information to the FBI. (Tr. 164.)

The FBI agents talked to the Scruggs on February 22, 1974, but they did not tell the Scruggs that Gardner had confessed (Tr. 258), nor did they tell the Scruggs that Kramer was furnishing them with any information. (Tr. 188, 224.)

Kramer talked to Scruggs, Sr., on January 25, 1974, when Scruggs, Sr., denied receiving any money from Gardner, but Kramer gave the Scruggs no indication that he was going to report this to the FBI. (Tr. 169.)

The Scruggs later admitted to the United States District Attorney that they had told Harris, an attorney who had previously represented Gardner, that Gardner had not paid them any money. (Tr. 243.) But there is no indica-

tion that Harris intended to convey this information to the FBI, nor is there even a suggestion in the record that the Scruggs had actual knowledge that Harris intended to convey this information to the FBI. (Tr. 244, 165.)

Therefore we respectfully submit that there is no proof in this record that either of the Scruggs had actual knowledge that Kramer, or Harris, intended to convey any information to the FBI, and under the rule established in the *Lippman* case, in the absence of such knowledge, the Scruggs misrepresentations to Kramer and Harris cannot be the basis of a conviction under Section 1510.

The holding of the *Lippman* case is in accord with the decision in the case of

United States v. Williams, (C.A. 8, 1973) 470 F.2d 1339

The court in this case stated (p. 1342):

"The House Committee on the Judiciary specifically stated in discussing scienter that there must be actual knowledge that the recipient or intended recipient of information be a criminal investigator as defined in § 1510(b). H.R. Rep. No. 658 U. S. Code, Cong. & Adm. News, 90th Cong. 1st Sess., p. 1760 (1967). Thus the report states, 'For example, if a person does not know that the investigator is a federal investigator, an act which would normally be in violation would not be so because of the lack of scienter as to the identity of the investigator.' Id. at p. 1762."

Furthermore, there is no proof as to when the misrepresentations were made to Harris; and Scruggs, Jr.'s denial to Kramer was on February 21, 1974, which is before

the period alleged in Count II of the indictment. (Tr. 156, 164.)

Since the misrepresentations to Kramer and Harris cannot, under the *Lippman* holding, constitute a violation of Section 1510, the only persons left who could be the basis for the Section 1510 indictment are the Scruggs themselves, and the FBI agents. Under the *Cameron* decision, there can be no violation of Section 1510 by the Scruggs, under these circumstances, because there was no third party with information which the Scruggs knowingly endeavored to prevent communication of to the FBI.

Accordingly, we respectfully submit that this Court overlooked the *Lippman* rule, and the fact that the Scruggs had no actual knowledge that Kramer or Harris intended to convey information to the FBI, in affirming the judgment of conviction in this case. We respectfully submit that for this reason this Court should grant this petition for rehearing as to Count II, and should dismiss Count II against both defendants.

CONCLUSION

We respectfully submit that the Court's opinion in this case overlooks the fact that the construction of 18 U.S.C., Section 2113(c) so as to apply to the Scruggs, who were the legal owners of the money, deprives the Scruggs of their property rights in said money without due process of law, in violation of the Fifth Amendment to the Constitution.

We further submit that the Court's opinion in this case overlooks this Court's prior ruling in the *Lippman* case, which is contrary to the Court's decision in the present case.

We therefore most respectfully and earnestly urge the Court to grant appellants a rehearing on these matters.

Because of the gravity of these matters, and of the consequences to the defendants, who have been practicing attorneys at the Shelby County, Tennessee, Bar for many years, and because it is necessary to maintain uniformity of the Court's decisions, we would respectfully suggest that the case be re-heard by the entire court *en banc*.

Respectfully submitted,

/s/ Robert W. Andrews

Robert W. Andrews

/s/ Erich W. Merrill

Erich W. Merrill

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for rehearing was mailed to the Honorable Glen Reid, Assistant United States Attorney, this 3rd day of March, 1977.

/s/ Erich W. Merrill

Nos. 76-1688-89

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HARRY U. SCRUGGS, SR., and

HARRY U. SCRUGGS, JR.,

Defendants-Appellants.

ORDER DENYING PETITION FOR REHEARING

(Filed April 18, 1977)

Before PHILLIPS, Chief Judge, and WEICK and PECK,
Circuit Judges.

No judge of the court having moved for rehearing *en banc*, the petition for rehearing has been considered by the hearing panel.

It is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ John P. Hehman

Clerk

No. 76-1612

Supreme Court, U. S.

FILED

AUG 8 1977

MICHAEL BOODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

**HARRY U. SCRUGGS, SR. AND HARRY U. SCRUGGS, JR.,
PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

**LAWRENCE G. WALLACE,
*Acting Solicitor General.***

**BENJAMIN R. CIVILETTI,
*Assistant Attorney General.***

**SHIRLEY BACCUS-LOBEL,
*Attorney,
Department of Justice,
Washington, D.C. 20530.***

In the Supreme Court of the United States
OCTOBER TERM, 1977

No. 76-1612

HARRY U. SCRUGGS, SR. AND HARRY U. SCRUGGS, JR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 549 F. 2d 1097.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1977. A petition for rehearing was denied on April 18, 1977 (Pet. App. A35). The petition for a writ of certiorari was filed on May 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether the trial court erred in instructing the jury that petitioners could be found guilty of violating 18 U.S.C. 2113(c) if, at any time during their possession of money stolen from a federally insured bank, they knew it had been stolen.

(1)

2. Whether the evidence was sufficient to support petitioners' convictions for having obstructed a criminal investigation, in violation of 18 U.S.C. 1510.

STATUTES INVOLVED

18 U.S.C. 2113(c) provides:

Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

18 U.S.C. 1510(a) provides:

Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or

Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—

Shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioners were convicted of having knowingly possessed, concealed, and disposed of money stolen from a federally insured bank, in violation of 18 U.S.C. 2113(c), and of having

willfully endeavored to obstruct, delay and prevent the communication of information by each other, and others, relating to a violation of 18 U.S.C. 2113, to criminal investigators, in violation of 18 U.S.C. 1510. Petitioner Harry U. Scruggs, Jr., was sentenced to concurrent terms of imprisonment for a year and a day on each count. Petitioner Harry U. Scruggs, Sr., was fined \$1,000 (\$500 on each count). The court of appeals affirmed (Pet. App. A1-A22).

On January 27, 1974, James Gardner was incarcerated in the County Jail for Shelby County, Tennessee, awaiting trial on several charges of armed robbery and related offenses (App. 18a).¹ Petitioners, who were attorneys in Memphis, Tennessee, communicated with Gardner at the jail and offered to represent him on the pending state charges. The evidence at trial, viewed most favorably to the government, showed that petitioners told Gardner that if Gardner could pay them \$20,000, they would "beat [his] cases by hook or crook" (App. 19a). Gardner agreed to pay \$10,000 in advance and \$10,000 later, and, with the assistance of Scruggs, Jr., he was released on bail on January 31, 1974 (App. 19a-20a).

On February 11, 1974, at approximately 2:30 p.m., Gardner and an accomplice robbed a branch of the Memphis Bank and Trust Company of some \$21,000 in cash (App. 20a). At 5:00 that evening Gardner went to petitioners' law office and gave them \$6,000 from the proceeds of the robbery as a first payment on his bill (App. 21a-22a). The cash was still in Memphis Bank and Trust Company wrappers when Gardner delivered it to petitioners (App. 22a). Gardner, however, did not inform petitioners of the source of the money at that time (App.

¹"App." refers to the joint appendix filed in the court of appeals.

22a). Scruggs, Jr. gave Gardner a receipt for the money and put the cash in his desk drawer.

Gardner returned to petitioners' offices the next day, where he paid Scruggs, Sr. \$3,000 more toward the fee. A bundle of ten consecutively numbered \$100 bills taken in the robbery was included in the payment (App. 22a-23a). Scruggs, Sr. gave Gardner a second receipt (App. 23a).

On the morning of February 15, 1974, petitioners told Gardner that they had information that he had robbed the bank, and Gardner admitted to them that he had done so (App. 24a). At the request of Scruggs, Sr., Gardner then returned the receipts he had been given by petitioners (App. 28a). Gardner was arrested that afternoon and an FBI agent informed Scruggs, Jr. that Gardner had been charged with bank robbery (App. 101a).

Petitioners visited Gardner the next morning in jail. After he told them that the money he had paid them had come from the bank robbery, they said that they would have to wait a long time before spending it because it was probably bait money from the bank (App. 32a-33a).

A local attorney, Bruce Kramer, was appointed to represent Gardner on the bank robbery charge. Scruggs, Sr. told Gardner not to tell his new attorney about the payments made with the bank robbery proceeds because Scruggs, Sr. did not "trust" Kramer (App. 35a). Despite this advice, Gardner, on February 21, 1974, informed Kramer of the payments (App. 36a, 38a). Gardner also told Jerry Harris, an attorney who had previously represented him on other matters (App. 37a-38a).

Unsure of Gardner's truthfulness, and interested in returning the money to obtain leniency on the bank robbery charge, Kramer telephoned Scruggs, Jr. on February

21, 1974, and inquired as to his receipt of the payments from Gardner. Scruggs, Jr. denied having received any money from Gardner (App. 65a). On the next day, with Kramer's approval, Gardner confessed to the FBI, detailing his delivery of the bank robbery proceeds to petitioners (App. 57a). Later that day petitioners were jointly interviewed by two FBI agents concerning the stolen money; they again denied receiving any cash payments from Gardner (App. 81a-82a, 104a). Scruggs, Jr. made a similar denial to Jerry Harris (App. 116a-117a). Two days after their interview with the FBI, petitioners gathered the cash they had received from Gardner, and Scruggs, Jr. then allegedly burned it in his home fireplace (App. 196a-197a). Finally, on February 25, 1974, Scruggs, Sr. repeated to Kramer that he had not received the payments from Gardner (App. 70a).²

ARGUMENT

1. Petitioners contend (Pet. 6-7) that 18 U.S.C. 2113(c) does not make criminal the possession of money stolen from a bank if possession was acquired without knowledge that the money had been stolen, and the possessor became aware of its stolen character only subsequently. They contend that the district court therefore erred in instructing the jury that they could be found guilty if the jury determined that they had knowledge that the money

²Petitioners' version of events differed in several respects from the government's evidence. They testified, for example, that on January 27 they only charged Gardner \$10,000 for their services (App. 132a-133a, 161a). They also testified that on February 11 they received only \$5,000 from Gardner and that the money was not in wrappers, although they acknowledged giving him a receipt for \$6,000 (App. 136a). Petitioners acknowledged, moreover, that they became aware by February 16 that Gardner had been charged with a bank robbery on February 11 and that thereafter they had denied to FBI agents, and to Kramer and Harris, that they had received money from Gardner (App. 185a, 190a, 220a).

was stolen at any time during their possession of it. Petitioners claim that the statute would otherwise be unconstitutional, because it would deprive them of property without due process of law.

Petitioners' contention is groundless. Their argument relies on the doctrine that (unlike the situation with other property) persons who innocently acquire stolen negotiable instruments, including currency, for value may in some circumstances acquire valid title as against the victim of the theft and be permitted to retain the instrument. See, e.g., *Ohio Casualty Ins. Co. v. Smith*, 297 F. 2d 265, 266 (C.A. 7). But, as the court of appeals correctly noted (Pet. App. A17), whatever the rule may be in other contexts, 18 U.S.C. 2113(c) has created a different rule with respect to the possession of money stolen from a federally insured bank with knowledge that the money was stolen.³ The statutory proscription is clear, and makes it a crime to possess such money "knowing the same to have been taken from a bank * * * in violation of [18 U.S.C. 2113(b)] * * *," whether or not the possessor knew the money was stolen at the time he received it. *United States v. Koran*, 453 F. 2d 144, 146 (C.A. 10); cf. *United States v. Gaddis*, 424 U.S. 544.⁴

³Petitioners did not object to the knowledge instruction on this ground at trial or seek to present their novel theory of defense to the jury. To the contrary, petitioners' counsel stated that he agreed with that portion of the charge in question, asking only that it be made clear to the jury that knowledge that the money was stolen must be shown during the time of concealment and also shown beyond a reasonable doubt (App. 266a-267a).

⁴Moreover, even if petitioners obtained title to the money they received from the robber, that fact is irrelevant to the question of their guilt under Section 2113(c). The actual currency taken in the robbery has significant evidentiary and investigatory value completely apart from its monetary worth. Thus, even if petitioners

2. Petitioners also attack their obstruction conviction (Pet. 8-9) on the ground that there was insufficient evidence from which the jury could find that petitioners knew or had reason to believe that Kramer and Harris had information to furnish to criminal investigators. That claim is belied by the record. As previously noted, pp. 4-5, *supra*, the evidence showed that at least by February 16 petitioners were aware that Gardner had been arrested by the FBI for bank robbery; that when Kramer asked Scruggs, Jr. on February 21 about having received money from Gardner, he denied it; that both petitioners told FBI agents on February 22 that they had not received money from Gardner; and that thereafter petitioners made the same denial to Harris and again to Kramer. The evidence thus overwhelmingly supported the jury's conclusion that petitioners knew that the FBI was investigating the whereabouts of the money, knew that Kramer and Harris had some information about it, and thus "endeavor[ed] by means of * * * misrepresentation [to Kramer and Harris] * * * to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal

did have "title" to the money and were entitled to retain its value against the bank, they were not entitled to possess, conceal and dispose of the actual cash proceeds of the robbery, as they did, in contravention of the plain language of the statute. The cases cited by petitioners involving stolen bank money are not to the contrary. *Ohio Casualty Ins. Co. v. Smith*, *supra*, and *Transamerica Insurance Co. v. Long*, 318 F. Supp. 156 (W.D. Pa.), involved innocent recipients for value of stolen money who no longer possessed the actual cash when they learned of its illegal source and were subsequently sued by the banks' insurers. In *Kelley Kar Co. v. Maryland Casualty Co.*, 142 Cal. App. 2d 263, 264-265, 298 P. 2d 590, 592, a car dealer was awarded part of the actual cash stolen in a robbery against the claim of the bank's insurer, but only after the money had been turned over to the FBI and used in the investigation and prosecution of the robbery.

investigator," conduct proscribed by 18 U.S.C. 1510(a).⁵

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE,*
Acting Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

SHIRLEY BACCUS-LOBEL,
Attorney.

AUGUST 1977.

⁵Petitioners err in contending (Pet. 8-9) that the decision below conflicts with *United States v. Lippman*, 492 F. 2d 314 (C.A. 6), certiorari denied, 419 U.S. 1107, and *United States v. Williams*, 470 F. 2d 1339 (C.A. 8), certiorari denied, 411 U.S. 936. Those cases merely establish that to sustain a conviction under the statute an accused must have had reason to believe that the person to whom he made misrepresentations had information that he intended to furnish to a criminal investigator. The evidence here clearly satisfied that requirement.

*The Solicitor General is disqualified in this case.

SEP 17 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1612

**HARRY U. SCRUGGS, SR., and
HARRY U. SCRUGGS, JR.,
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vs.

**UNITED STATES OF AMERICA,
*Respondent.***

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

**REPLY BRIEF OF PETITIONERS TO BRIEF
FOR THE UNITED STATES IN OPPOSITION**

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1612

HARRY U. SCRUGGS, SR., and
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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
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**REPLY BRIEF OF PETITIONERS TO BRIEF
FOR THE UNITED STATES IN OPPOSITION**

**1. The Government's Argument Misconstrues the
Wrongful Possession of Stolen Money Statute.**

Petitioners respectfully pray the permission of this Court to file this brief of reply to the erroneous construction of 18 U.S.C., Section 2113(c), by the Government in its argument.

The Government concedes that persons who innocently acquire currency for value may "in some circumstances"

acquire valid title as against the victim of the theft; and then argues that Section 2113(c) simply prohibits the possession of such money for as long as the Government has need of the money in its investigation and prosecution of the robbery. But the statute is not so limited.

The Government's argument, as set forth in its footnote 4 on page 6 of its Brief in Opposition, implies that the summary divestiture of property rights in money acquired by a purchaser of such money for value without knowledge of its having been stolen, simply because such purchaser thereafter learns the money has previously been stolen, is permissible because only a portion of such rights is divested—that when the Government has no further use for the currency in investigating or prosecuting the robber, the currency can be returned to the owner, or he can be given its value.

But the statutory proscription is not limited to the time during which the Government has need of such currency for investigation or prosecution. The statute flatly prohibits possessing or disposing of such property at any time thereafter.

The Kelly Kar Co., if it did take the cash that had been stolen from a bank back into its possession pursuant to the judgment in the case of *Kelly Kar Co. v. Maryland Casualty Co.*, 142 Cal. App. 2d 263, 264-265, 298 P.2d 590, 592, would be just as guilty of violating Section 2113(c) as the petitioners were, because the statute provides no exception for possession or disposal of such money, even after the Government has no further need of the currency for prosecution.

The Government argues that petitioners might be entitled to retain the value of the money, but not the currency itself. But again, the statute makes no such distinction.

The statute prohibits disposing of "money or other thing of value" knowing same to have been taken from a bank. If the Government should take the currency and give the petitioners a bank credit equal to the value of the money, petitioners would still be guilty of violating the statute if they "disposed of" the bank credit, because they would have knowledge such "thing of value" had been stolen from a bank.

The statute, 18 U.S.C., Section 2113(c), when applied to one who has acquired currency for value without knowledge it was stolen, summarily deprives such owner of all of his rights in such currency, without any opportunity for a judicial determination of his rights in the currency, which is clearly spoliation prohibited by this Court's decision in *Chicago, B. & Q. R. Co. v. Chicago*, (1897) 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979.

Finally, we strongly disagree with the Government's assertion, in footnote 3 on page 6 of its Brief in Opposition, that petitioners did not object to the trial court's instructions that the jury could find defendants guilty even if they did not know the money was stolen when they received it. (Appendix, 264a.) Petitioners' trial counsel did object to this instruction. (Appendix, 266a, lines 6 through 9.) Thereafter, trial counsel became somewhat confused because he could not remember the point he wished to call to the court's attention, and it is not clear just what he did mean to say. (Appendix, 266a-267a.)

But even in the absence of objection, this instruction constituted such fundamental error that it should be reversed.

United States v. Allegrucci, (C.A. 3, 1958) 258 F.2d 70, 75 (footnote 8)

2. The Government's Argument on the Obstruction Conviction Is Manifestly Wrong.

The Government asserts, as to the obstruction conviction under 18 U.S.C., Section 1510, that because the petitioners knew that the FBI was investigating the whereabouts of the money paid to petitioners as a fee by the bank robber, Gardner, and because petitioners also knew that Gardner's new attorney, Kramer, and his former attorney, Harris, had some information about the money paid to petitioners, the petitioners must have known that Kramer and Harris, Gardner's attorneys, were going to furnish information to the FBI, and that petitioners attempted to obstruct or delay the communication of such information by misrepresentation.

Such assertion by the Government is demonstrably wrong, because even if the Government's view of the evidence is correct, the petitioners could not have had knowledge that Kramer and Harris had information that they were going to furnish to the FBI.

Thus the Government asserts that the fact that the petitioners knew that the FBI was investigating the whereabouts of the money, and also knew that Kramer and Harris had some information about it, and the fact that petitioners falsely denied having been paid the money, constitutes overwhelming circumstantial evidence that petitioners knew that Kramer and Harris had information they intended to communicate to the Government, which they attempted to obstruct by misrepresentation.

But the fact that the FBI had information that Gardner, who was then in jail, had paid the Scruggs some of the stolen money as a fee, could only mean to the Scruggs that Gardner and his attorney had already told the FBI about his payment to the Scruggs. No one else

had any knowledge of this. Since the FBI had obviously already been told about the payment to the Scruggs, Kramer and Harris had no information that had not already been communicated to the FBI.

Thus the Scruggs could not have had actual knowledge that Kramer and Harris had information they were going to furnish to the FBI, since information about the payment to the Scruggs had to have already been furnished to the FBI by the bank robber and his attorney. And the Scruggs' denial that they had received the money could not have been for the purpose of obstructing or preventing the communication of information to the FBI, since it was apparent to the Scruggs that the FBI already had that information.

Therefore, the Court of Appeals decision is contrary to its own previous decision in *United States v. Lippmann*, (C.A. 6, 1974) 492 F.2d 314, 317, and is contrary to the decision of the Eighth Circuit in *United States v. Williams*, (C.A. 8, 1973) 470 F.2d 1339, both of which held that a defendant must have knowledge that a third person has information that he is going to furnish to a Federal investigator, the communication of which the defendant attempts to obstruct or delay by misrepresentation. Even accepting the Government's view of the testimony, the proof in this case shows that petitioners had no such knowledge, and that their misrepresentation was not for the purpose of obstructing or delaying the communication of such information to the FBI.

CONCLUSION

For the reasons set forth in the petition for writ of certiorari filed herein, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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